

Umrao Khan Akbar Khan Vs Waheed Khan Abdul Majeed

Miscellaneous Civil Appeal No. 17 of 1958

Court: Madhya Pradesh High Court (Gwalior Bench)

Date of Decision: July 9, 1960

Acts Referred:

Limitation Act, 1908 & Article 181, 182(5)

Citation: AIR 1960 MP 388 : (1962) ILR (MP) 130 : (1960) JLJ 738

Hon'ble Judges: Shiv Dayal, J

Bench: Single Bench

Advocate: P.D. Gupta, for the Appellant;

Final Decision: Allowed

Judgement

Shiv Dayal, J.

This second appeal arises out of an execution matter. The lower appellate court has dismissed the application for execution

us barred by time.

2. The short facts are that in execution of his decree the appellant at first got some move-ables of the judgment debtor attached and then applied

for attachment and sale of his house, to which the respondent objected. But the objection was overruled (execution No. 18 of 1949). The

judgment debtor took an appeal against it. In the meanwhile the house was sold. The highest bid was of the decree holder. On January 10, 1950,

the Nazir knocked down the sale in anticipation of its acceptance by the court. However, on February 8, 1950 the appellate court stayed further

proceedings of sale. Eventually the appeal was dismissed on September 29, 1950. An appeal was then preferred by the judgment-debtor to the

High Court of Madhya Bharat but it was dismissed on December 4, 1953.

3. The present application for execution was made on September 8, 1955. The question is whether this second application for execution is within

time. The first appellate court has held against the decree-holder on the ground that the stay order which was passed by the District Judge stood

automatically vacated on September 29, 1950 when the appeal was dismissed and since there was no stay order passed by the High Court of

Madhya Bharat, the limitation could not be computed from December 4, 1953 and the second application for execution having been presented

after three years from September 29, 1950 it was barred by time.

4. On going through the record I find that both sides contested the case on the application of Clause (2) of Article 182 of the Limitation Act.

Controversy raged on the question whether the decision on the appeal which was filed to the High Court by the judgment-debtor could give a fresh

start of limitation. On behalf of the decreeholder aid was sought from the decision of the Privy Council in AIR 1932 165 (Privy Council) : ILR 60

Cal 1. But in my view, in both the courts below the position of law was misconceived. Article 182(2) is entirely irrelevant here. What I find is that

on July 20, 1950 the earlier application for execution (No. 18 of 1949) was dismissed for default.

Now that execution had been stayed by the order of the District Judge dated February 8, 1950 and the appeal was decided on September 29,

1950. It may have been for administrative reasons that the execution was dismissed for default; in the eye of law since the proceedings had been

suspended, the execution must be deemed to be pending. In that view of the matter what is to be seen is whether the application which the decree-

holder made on September 8, 1955 could be treated as an application for reviving the dismissed application No. 18 of 1949. It seems clear to me

that where an execution is suspended for no default of the decree-holder, in reality it remains pending and can be revived on an application by the

decree-holder without being hindered by any rule of limitation.

It is not barred either under Article 182(5) nor Article 181. But the court has to see cautiously whether the same relief is claimed and it is the

continuity of the suspended execution from the stage of its suspension which is prayed or that a new relief or new mode of execution is sought. In

the latter case, it will be a fresh application, even though it be styled as an application for revival. On the contrary if the application is merely to call

the attention of the court that it has to continue the proceedings which had been suspended, it is immaterial that it is drawn on a printed form as if it

were a fresh application for execution.

It is the substance of the application on which depends the legal effect. Here, the decree- holder has merely pressed For confirmation of the sale

which had taken place in execution No. 18 of 1949 and for proceeding further with the execution. In reality, therefore, this application of

September Section 1955, is an application reminding the court to proceed with the previous execution application which had been obstructed on

the judgment-debtor's appeal. Such an application can be made without any bar of time.

5. This appeal is allowed, the judgment and order passed by the first appellate court are set aside. The case shall now go back to the execut ing

court for proceeding further with execution No. 18 of 1949, according to law. The appellant shall get his costs in this court as well as in the court

of first appeal.